Year in Review

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I. INTRODUCTION

2020 was defined by the global COVID-19 pandemic, which has changed how we live, work, and interact with one another. 2020 was also notable in witnessing Canadian society adapt and respond to broader social movements calling for change. Decisions from both the Supreme Court of Canada (SCC) and the Manitoba Court of Appeal (MBCA) have responded to these shifting social norms by recognizing broad systemic issues pervasive in the justice system and society-at-large. There is much to celebrate when courts venture into these waters, but the age-old polemic of judicial activism is sure to follow when courts raise their voices beyond the confines of legal doctrine. This article comments on some of the most important cases decided in this unique and turbulent year in Canada.

We examine the jurisprudence of the MBCA and the SCC in February 2020 through February 2021, inclusive, with the goal of highlighting recent changes and developments in the criminal law. Where relevant, some appeals that fall outside of this period will be discussed due to their significance to the law. Further, using the framework and parameters developed in previous Robsoncrim "Year in Review" articles, we have attached an appendix of statistical infographics which highlight statistical findings of the decisions of the SCC and MBCA between the period of February 2020 and February 2021.

In 2020, the SCC also appears to have continued its trend of limiting full written decisions, preferring instead to issue extremely brief judgments.[1] While clear and succinct legal writing is to be encouraged, there can be little doubt that fulsome reasons are required to guide lower

[1] See e.g. *R v Knapczyk*, 2016 SCC 10; *R v Shaoulle*, 2016 SCC 16; *R v Hunt*, 2017 SCC 25; *R v Robinson*, 2017 SCC 52; *R v Ajise*, 2018 SCC 51; *R v Culotta*, 2018 SCC 57; *R v JM*, 2019 SCC 24; *R v Kernaz*, 2019 SCC 48; *R v Riley,* 2020 SCC 31; *R v Langan*, 2020 SCC 33; *R v Yusuf*, 2021 SCC 2; *R v Murtaza*, 2021 SCC 4.

courts' decision-making. Under Chief Justice Wagner, the SCC continues to offer plenty of dissenting opinions and disagreement within the Court; all of it, however, appears more "tightly packaged" than under the previous tenure of Chief Justice McLachlin. It remains to be seen if this warm embrace of brevity is to be celebrated or if a lack of detailed analysis breeds confusion in the courts below.

II. METHODOLOGY

As with previous Year in Review articles,[2] we utilized both quantitative and qualitative analyses to highlight trends in the jurisprudence. The data collected for this review was limited to decisions from the SCC and MBCA from February 2020 through February 2021, inclusive. The cases were then reviewed, inserted into a data table organized by the judgement date, and subsequently categorized. We drew cases from two sources: CanLII, a publicly accessible database from the Canadian Legal Information Institute, and WestlawNext, a subscription-based database from Thomson Reuters Canada. Each reviewed case was analyzed, and certain variables were noted, including the date of the decision, a description of the decision, the hearing judge, the court of origin, the appeal result, and the docket and citation information. Other variables, especially for the SCC cases, were also noted, including identified themes and connections to other cases. In total, there were 20 criminal law cases heard by the SCC and 63 cases heard by the MBCA in the prescribed period.

Upon reviewing the data collected, the cases were categorized and placed into one of six groups (Evidence, *Charter*, Trial Procedure, Sentencing, Defences, and Miscellaneous). Of course, these categories are not watertight compartments, and a certain amount of discretion is required when categorizing a case. Many cases, for example, could fall under *Charter* and Evidence. Where this is the case, we have used our best judgement to arrange cases in a way that helps the reader know what the case is about at first blush. In other words, there is no scientific rigor in the categorization. Where a case touched upon multiple appellate categories, it was decided to only include the case in one category – namely, the category which we deemed was most relevant to the case. As a

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2 See Brayden McDonald & Kathleen Kerr-Donohue, "Robson Crim Year in Review" (2020) 43:4 Man LJ 245.

result, despite our best efforts to make categorization an objective process, subjectivity is implicit. This methodology is consistent with our intention to summarize the jurisprudence, knowing, of course, that nothing replaces a complete and careful reading of the cases.

III. STATISTICS: SCC

A. Court of Origin

Of the appeals heard from February 2020 through to February 2021, inclusive, 20 criminal law cases appeared before the SCC. As is often the case, the majority of the decisions originated from Ontario (n=7/20). Other Provinces supplying appeals included British Columbia (n=4/20), Alberta (n=3/20), Manitoba (n=2/20), Saskatchewan (n=2/20), Quebec (n=1/20), and Nova Scotia (n=1/20). The Supreme Court heard no appeals from New Brunswick, Prince Edward Island, Newfoundland and Labrador, Northwest Territories, Yukon, Nunavut, the Federal Court of Appeal, or the Court Martial Appeal Court of Canada ("CMACC").

B. Appellant Versus Respondent Rates

Following the trend of 2019 almost exactly, defence counsel appeared as the Appellant in 63% (n=12.5/20) of the appeals (the Crown appeared as Respondent in 37% (n=7.5/20) of the appeals). We considered the appeal in the peremptory challenge case, *R v Chouhan*, as a split appeal (Crown appeal with a defence cross-appeal).

C. Overall Success Rates

Notably, defence counsel only succeeded in 25% (n=5/20) of appeals, while the Crown succeeded in 70% (n=14/20) of appeals. One appeal was characterized as a mixed result (n=1/20).

D. Appellant Categories

Evidence and *Charter* were the most commonly explored categories before the SCC from February 2020 through February 2021, accounting for 40% (n=8/20) and 20% (n=4/20) of appeals heard, respectively. Defences and trial procedures each accounted for 15% (n=3/20) of the

appeals, and both Miscellaneous and Sentencing accounted for 5% (n=1/20) of the appeals.[3]

IV. Case Analysis: SCC

A. *Charter*

Of the 20 appeals that the SCC decided between February 2020 and February 2021, four were placed under the category of *Charter* appeals. Interestingly, the scope of *Charter* appeals which the SCC heard was markedly limited, with most of the *Charter* appeals addressing *Jordan*-related questions and providing further guidelines to the applications of *Jordan* timelines.

One such appeal was *R v KGK*, a case arising in Manitoba. In *KGK*, the matter took 42 months from charge to the rendering of the judge's verdict.[4] The primary focus of the Court's decision was whether *Jordan* presumptive ceilings applied in the time spent by a judge rendering their verdict. In his majority decision, Justice Moldaver held that *Jordan* ceilings only apply from the date of the charge until the actual or anticipated end of evidence and argument; not the time spent by judges rendering their verdicts.[5] The Court further considered the test under s. 11(b) of the *Charter*, as applied to time a judge spends rendering a verdict, and ultimately decided that the onus is on the accused to show that their right to be tried within a reasonable time has been infringed by a lengthy verdict deliberation time and that the defence must show that deliberation time took markedly longer than it reasonably should have in the circumstances.[6] The SCC majority made it clear that this test is a high bar to meet, a position which is also supported by the presumption of judicial integrity.[7]

Another case of note in which the SCC considered the *Jordan* presumptive ceilings is *R v Thanabalasingham*.[8] In *Thanabalasingham,* the

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3 To see visual representations of these and other statistics, in addition to a comparison of trends in cases before the SCC and MBCA from 2019 and 2020, please refer to Appendix II of this paper.

4 *R v KGK*, 2020 SCC 7.

5 *Ibid* at para 31.

6 *Ibid* at para 65.

7 *Ibid*.

8 *R v Thanabalasingham*, 2020 SCC 18.

Court considered the application of the transitional exceptional circumstance in *Jordan* in the context of second-degree murder.[9] The accused was charged with the murder of his spouse in 2012. The matter was not set for trial until 2017, and Thanabalasingham was in jail during that period. As most of the delay happened before the *Jordan* decision was released, the Crown argued that the ceiling can be exceeded where the state satisfies the court that the time taken was based on reasonable reliance of the law as it previously existed. The SCC rejected this argument and found that when an accused is forced to wait four and a half years for a trial, their s. 11(b) *Charter* rights will, perhaps unsurprisingly, be violated. The Court also noted the role that the seriousness of the offence and prejudice to the accused play in determining whether delay is unreasonable.[10] While a charge of murder is extremely serious, there is no doubt the Supreme Court is committed to the *Jordan* ceilings, making it clear that all players in the justice system must continually move matters forward in a timely fashion. The Court, therefore, took the opportunity in *Thanabalasingham* to highlight the fundamentals of *Jordan*, including the importance of Crowns making reasonable and responsible decisions in exercising their discretion, as well as the importance of defence counsel helping to move matters smoothly through the justice system.[11]

Although not *Jordan*-related, the theme of timeliness returned in the context of over-holding in *R v Reilly*. The accused was being held in custody on assault causing bodily harm charges in Alberta. *Criminal Code* s. 503(1) governs the initial detention of an accused in custody and prescribes that an accused must be brought before a justice within 24 hours. Reilly waited 35 hours before being brought before a justice to determine the issue of bail. The trial judge found that, because of systemic problems with the detention and bail system in Edmonton, this was unacceptable, and a stay of proceedings should be entered. The Alberta Court of Appeal disagreed and wanted the accused to face trial. However, the SCC determined in *Reilly* that it was appropriate to enter a stay of proceedings pursuant to s. 24(1) of the *Charter*, stemming from the

9 *Ibid* at para 2.
10 *Ibid* at para 8.
11 *Ibid* at para 9.

problem-ridden implementation of Alberta's bail system and broader systemic issues.[12]

Reilly is a case that is easy to overlook in 2020. As is seemingly becoming the norm, it is a very brief decision outlining in the barest terms the scope of disagreement with the Alberta Court of Appeal. We would suggest, however, that this is an important decision showing the SCC's willingness to recognize systemic problems in our criminal justice system and to offer individualized remedies under s. 24(1) of the *Charter* when these problems create unfairness to an accused. As with the *Jordan* line of authority, the Court shows little tolerance for the State's inability to move an accused through the criminal justice system with alacrity. It is unclear what impact this decision will have on other procedural practices in the criminal justice system. However, the Crown is on notice that arguing an overwhelmed criminal justice system creates delay we simply must put up with, may be falling on deaf ears in our highest court.

The final *Charter* case which the SCC considered was *R v Chouhan*.[13] The question in *Chouhan* was whether Bill C-75, which eliminated peremptory challenges (the ability for an accused and the Crown to dismiss a juror without cause) and substituted judges for lay triers of fact, was constitutional within the confines of ss. 7, 11(d), and 11(f) of the *Charter*.[14] The government had brought the peremptory legislation into place in the wake of the Gerald Stanley trial concerning the murder of a young Indigenous man, Colten Boushie.[15] Chouhan was convicted at trial after his argument to receive peremptory challenges during jury selection was dismissed by the trial judge. Though the Ontario Court of Appeal found the provisions of Bill C-75 were constitutional, they held that the

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12 *R v Reilly*, 2020 SCC 27.

13 *R v Chouhan*, 2020 CarswellOnt 14612, SCJ No 101. No neutral citation is available yet. For a discussion about issues that animated the practice community see Michelle I. Bertrand et al, "'We have centuries of work undone by a few bone-heads': A Review of Jury History, a Present Snapshot of Crown and Defence Counsel Perspectives on Bill C-75's Elimination of Peremptory Challenges, and Representativeness Issues" (2020) 43:1 Man LJ 111.

14 For a further discussion of the Appeal Court decision in *Chouhan*, see Michelle I. Bertrand et al, *supra* note 13 at 113–44, 136–38.

15 For a fulsome discussion of the Stanley trial and its ramifications to the legal system, see Kent Roach, *Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (Kingston, ON: McGill-Queen's University Press, 2019). For a discussion about eliminating peremptories and lawyer reactions, see Bertrand et al, *supra* note 13.

provisions should not have applied to those pending a jury trial at the time the changes happened. The Crown, therefore, appealed the ruling arguing that all jury trials held after the date of the provisions coming into force should not allow peremptory challenges. Despite this being a Crown appeal to the Supreme Court, Chouhan argued that the lack of peremptory challenges violated his *Charter* rights. Ultimately, the Court found that the Bill C-75 changes, including eliminating peremptory challenges, were constitutional.

However, that does not tell the full story of this case. This case created tensions within the practice community; there was much disagreement as to the purpose of peremptory challenges – do they increase or decrease systemic racism in the criminal justice system?[16] During argument, parties and interveners presented very different takes on what peremptory challenges meant to the jury selection process. Put simply, some lawyers think peremptory challenges help to create diversity in a jury pool while other lawyers believe peremptory challenges create less diversity and promote systemic racism. Despite the nuances of these positions being fully argued before the Supreme Court, we are left with a majority decision grounded in the belief that a representative jury does not include the right to a jury of a particular racial composition.[17]

Finally in this section, though a quasi-criminal *Charter* case, *Quebec (Attorney General) v 9147-732 Québec Inc.* clarified that s. 12 *Charter* protections against cruel and unusual punishment do not extend to corporations, and it is a right only humans can enjoy.[18]

B. Defences

Of the 20 criminal law appeals which the SCC heard in the timeframe of February 2020 through February 2021, only three fall under the category of defences. One of the more contentious decisions rendered by the SCC in 2020 was *R v Ahmad.* In *Ahmad*, the Court was asked to re-examine the viability of the defence of entrapment in the context of dial-a-dope operations.[19] The five-person majority upheld the test previously iterated in *R v Mack* and *R v Barnes*, which allowed for police to present

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16 For an in-depth discussion of these arguments, see Bertrand et al, *supra* note 13 at 128–38.

17 *Chouhan*, *supra* note 13 at para 104.

18 *Quebec (Attorney General) v 9146-0732 Québec Inc*, 2020 SCC 32.

19 *R v Ahmad*, 2020 SCC 11 at para 3 [*Ahmad*].

an opportunity to commit a crime only upon forming reasonable suspicion based upon a combination of information that a specific person is engaged in criminal activity and/or people are carrying out criminal activity at a specific location.[20] Moreover, the Court further upheld the decision in *Mack* and *Barnes* that provides that unless reasonable suspicion exists, a stay of proceedings will be entered for entrapment.[21] The majority also found that the standard of reasonable suspicion is objective, and they recognized that the law should be cautious in expanding police powers.[22] With that said, the majority emphasized that reasonable suspicion is still the standard required since it guards against systemic racism and decreases the likelihood that vulnerable or marginalized people will commit a crime where they otherwise would not.[23] The majority's decision in *Ahmad* was subsequently applied in another case before the SCC in *R v Li*.[24]

Of note, *Ahmad* marked a particularly contentious decision from the SCC because it was one of only a few appeals from February 2020 through February 2021 in which a scathing dissent was written. In Justice Moldaver's dissenting opinion (with Justices Wagner, Cote, and Rowe), he sought to expand police powers by vitiating the potential defence of entrapment in all but abuse of process situations. The dissent held that a *bona fide* inquiry should be defined as a "factually-grounded investigation into a tightly circumscribed area, whether physical or virtual, that is motivated by a genuine law enforcement purpose."[25]

Finally with reference to defences, in *R v Chung*, the SCC dismissed an appeal that focused on the requisite *mens rea* required for the offence of dangerous driving causing death.[26] Mr. Chung drove into a busy intersection in Vancouver at three times the legal speed limit, killing another motorist.[27] The accused was acquitted of dangerous driving causing death because there was a reasonable doubt as to the mental element of the offence. The British Columbia Court of Appeal

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20 *Ibid* at paras 8, 15–23, 57.
21 *Ibid* at paras 15, 85.
22 *Ibid* at para 26.
23 *Ibid* at paras 25–28.
24 *R v Li*, 2020 SCC 12.
25 *Ahmad*, *supra* note 19 at para 90.
26 *R v Chung*, 2020 SCC 8.
27 *Ibid* at para 1.

substituted a conviction based on an error of law; the trial judge believed a brief period of excessive speed, no matter how fast, could not support the marked departure standard.[28]

The Majority of the Supreme Court (sitting unusually as a panel of only five justices) found that the trial judge had erred in focusing on the momentary nature of the speeding involved. Rather, momentary speeding can establish the *mens rea* of dangerous driving where it supports the inference that the driving was a marked departure from the standard of care a reasonable person would have exhibited in the circumstances.[29] When establishing the *mens rea* for dangerous driving, the focus of the trial judge should be on what a reasonable person would have foreseen in the circumstances.[30]

C. Evidence

Of the 20 appeals which the Supreme Court ruled upon, eight were on the topic of evidence. For the purposes of this paper, the decisions have been split into two categories based upon the type of evidence at issue on appeal: non-sexual evidentiary appeals and sexual evidentiary appeals.

1. Evidentiary Appeals Relating to Non-Sexual Offences

In *R v Doonanco*, the Supreme Court had to consider the role of the rule in *Browne v Dunn* in the context of calling expert evidence. The Crown failed to disclose their expert report to the defence and failed to put the contents of that report to the defence expert on the stand.[31] The Court found that it was prejudicial for the trial judge to have remedied the situation by simply not allowing the Crown's expert witness to comment on the defence's expert witness' evidence. The Supreme Court instead found the only way to protect the accused's right to a fair trial was to preclude the Crown expert from testifying. As such, a new trial was ordered.[32]

The Court was asked to determine the admissibility of both pre- and post-offence text messages and the weight to be given to them in *R v*

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28 *Ibid* at para 7.

29 *Ibid* at para 19.

30 *Ibid* at para 25.

31 *R v Doonanco*, 2020 SCC 2 at para 1.

32 *Ibid* at paras 4–5.

Langan.[33] Interestingly, the Court accepted the dissenting reasons of Justice Bauman from the British Columbia Court of Appeal in which he held that the text messages were admissible as part of the narrative and circumstantial evidence and, therefore, constituted an exception to the rule against prior consistent statements.[34] In effect, the text messages were admitted not for their truth but rather to establish the fact, timing, and circumstances of their contents, all of which supported inferences of truth and reliability.[35]

The Court also provided guidance on weighing the evidence provided by people with intellectual disabilities in *R v Slatter*.[36] In *Slatter*, the Court made it clear that triers of fact must be very careful to not attribute general characteristics to people with an intellectual disability, and ought to also be wary of accepting expert evidence for the purposes of attacking the credibility and/or reliability of witnesses with intellectual disabilities.[37] As a result, the Court's decision in *Slatter* ensures that myths and stereotypes surrounding people with disabilities are not perpetuated and that they too have equal access to justice.[38]

2. Evidentiary Appeals Relating to Sexual Offences

2020 did not see many developments in the law surrounding evidence in sexual assault cases – an area that has seen considerable development in the past five years.[39] In *R v Delmas*, the trial judge allowed the complainant to testify on her prior sexual history without holding a *voir dire*. Although the SCC recognized that it was an error, it resulted in no substantial wrong or miscarriage of justice as it would not have changed the verdict, and the appeal was dismissed.[40] A similar decision was reached in *R v WM*, where the trial judge mistook the specific year an offender received treatment – something to which the trial judge gave

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33 *R v Langan*, 2020 SCC 33.

34 *R v Langan*, 2019 BCCA 467 at paras 88–105.

35 *Ibid* at para 99.

36 *R v Slatter*, 2020 SCC 36.

37 *Ibid* at para 2.

38 *Ibid*. For a general discussion of disability in the criminal justice system, see Laverne Jacobs et al, *Law and Disability in Canada: Cases and Materials* (LexisNexis, 28 August 2021).

39 It should be noted that the Supreme Court will hear the *JJ* case relating to ss. 276 and 278 of the *Criminal Code* in October 2021.

40 *R v Delmas*, 2020 SCC 39.

weight. However, again, the Court found that there was no material impact on the assessment of evidence or the accused's credibility, resulting in no miscarriage of justice, and the appeal was allowed in favour of the Crown.[41] The opposing argument of *Delmas* was made in *R v Cortes Rivera*.[42] In *Cortes Rivera*, the trial judge did not grant a s. 276.1 application to cross-examine the complainant on her prior sexual history, and leave to appeal was sought. Once again, the SCC relied upon the curative proviso and determined that no prejudice or miscarriage of justice arose and, therefore, dismissed the appeal.[43]

Determining the pathways to conviction where consent is unclear was a question before the SCC in *R v Kishayinew*.[44] Ultimately, the majority found itself in agreement with the dissent of Justice Tholl of the Saskatchewan Court of Appeal ("SKCA"), who held that non-consent can be proven when the complainant has blacked out at the time of sexual activity but has memory of circumstances before and after the sexual assault. The Court, in accepting Justice Tholl's dissent, held that where surrounding circumstances are consistent with a complainant's assertion that they did not want to engage in sexual activity, this can form the basis for a determination of non-consent. However, if a lack of consent is not proven beyond a reasonable doubt, the analysis then shifts to prove that complainant was incapable of consenting.[45]

Finally, in *R v Mehar*i, the Court considered whether uneven scrutiny amounted to an independent ground of appeal or a distinct error of law. With very minimal oral reasons provided, the SCC refrained from commenting on this question and instead sent the matter back to the SKCA to hear the other grounds of appeal.[46]

D. Sentencing

Sentencing was one of the least considered categories at the SCC from February 2020 through February 2021. Of the 20 appeals heard during that timeframe, only one touched upon sentencing – *R v Friesen*.[47]

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41 *R v WM*, 2020 SCC 42.
42 *R v Cortes Rivera*, 2020 SCC 44.
43 *Ibid.*
44 *R v Kishayinew*, 2020 SCC 34.
45 *R v Kishayinew*, 2019 SKCA 127 at paras 52–78.
46 *R v Mehari*, 2020 SCC 40.
47 *R v Friesen*, 2020 SCC 9.

Friesen is an appeal that originated in Manitoba and is rooted in a horrific set of facts pertaining to the sexual abuse of an infant and the subsequent extortion of the infant's mother. The SCC's decision in *Friesen* marked a shift in judicial mindset to better recognize the multiple harms experienced by children who are the victims of sexual crimes, noting sentences for such crimes must acknowledge these harms and not be treated as less serious than offences against adult victims.[48] Notably, the Court recognized that these harms could take many years to manifest, and sexual violence against children affects other people in the lives of the victims.[49]

In *Friesen*, the Court also provided a non-exhaustive list of factors to determine whether or not a sentence is fit for offenders who commit sexual violence against children, including: (1) the likelihood that the offender will re-offend; (2) the abuse of a position of trust or authority; (3) the duration and frequency of abuse; (4) the age of the victim; (5) the degree of physical interference; and (6) victim participation.[50] The Court further warned against establishing a hierarchical sentencing regime based on the type of sexual act, and, by doing so, they recognized that in many cases there is not always a clear correlation between the harmful act and the harm which the victim experiences.[51] Societal concerns around the potential for lifelong harm caused by sexual offences and trauma-informed practice in the criminal justice system and infuse this judgment. The Supreme Court dedicates a lengthy judgment to these issues and provides clear and cogent direction to lower courts on the sentences that should be imposed as a result of sexual offences, generally, and against children, specifically. The *Friesen* decision reflects the growing understanding of the pain and suffering caused by sexual assault.

E. Trial Procedure

Unlike previous years, appeals on trial procedure constituted a small proportion of those before the SCC, constituting three of the 20 criminal law appeals before the SCC from February 2020 to February 2021. The nature of *Vetrovec* warnings was contemplated in *R v Riley*, in which the SCC clarified the role they have during a trial where a witness is providing

48 *Ibid* at para 107.
49 *Ibid* at para 76.
50 *Ibid* at paras 122–54.
51 *Ibid* at para 146.

exculpatory, rather than inculpatory, evidence.[52] The Court agreed with the dissent of Justice Scanlan at the Nova Scotia Court of Appeal (NSCA),[53] who held that *Vetrovec* warnings should not place the burden on the accused to show that an exculpatory witness is credible, given that its purpose is to protect against wrongful convictions.[54]

In *R v SH*, the SCC considered the rule in *Browne v Dunn* as it applies to case splitting.[55] At trial, SH's defence relied on the theory that there was insufficient proof of residency and phone linkage to an address where a significant number of illicit drugs were located. However, in cross-examination, defence counsel did not put their theory to the Crown's police witnesses. As a result, following defence counsel's closing, the Crown objected on the grounds that the theory was not put to their witnesses, and the trial judge permitted the Crown to re-open its case and re-call their police witnesses to give evidence on those matters.[56] At the SCC, in a 3-2 split, the majority upheld the Ontario Court of Appeal's (ONCA) decision that although the trial judge erred in allowing the Crown to split its case, there was overwhelming evidence against *SH*, and the curative proviso could sustain the conviction.[57]

R v Esseghaier contemplated the jury selection processes under s. 640 of the *Code*.[58] By way of background, s. 640 permitted, at the time, three possible options of jury selection: rotating triers where nobody is excluded, rotating triers with unsworn jurors excluded, static triers, if an application is made, and static triers with the exclusion of both sworn and unsworn jurors, which, again, requires an application to be made.[59] At trial, counsel for the co-accused made an application to have static triers with both sworn and unsworn jurors excluded, and the trial judge stated that they were not permitted to order this, something which the ONCA found to constitute an error.[60] Moreover, the trial judge made both the accused and the co-accused use the same jury selection process, something which the ONCA found deprived the accused of his right to choose the

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52 *R v Riley*, 2020 SCC 31.

53 *R v Riley*, 2019 NSCA 94 at paras 168–69.

54 *Ibid* at para 131.

55 *R v SH*, 2020 SCC 3 [*SH* SCC].

56 *R v SH*, 2019 ONCA 669 at paras 1–7.

57 *SH* SCC, *supra* note 55 at paras 1–3.

58 *R v Esseghaier*, 2021 SCC 9; *R v Esseghaier*, 2020 CarswellOnt 14614.

59 *Ibid*.

60 *R v Esseghaier*, 2019 ONCA 672 at paras 32–60 [*Esseghaier* ONCA].

jury selection process.[61] On these grounds, the ONCA found that there was prejudice, and the accused's conviction was set aside.[62] The SCC agreed the jury was improperly constituted but found that the curative proviso in s. 686(1) applied, and they restored the accused's conviction.[63]

F. Miscellaneous

Arguably one of the trending topics before the Court from February 2020 through February 2021 was addressing pressing social issues and for good reason. In particular, *R v Zora* was one decision in which the SCC recognized the numerous socio-legal issues flowing from the imposition of onerous bail conditions.[64] In *Zora*, the accused was granted bail on his substantive offence and was released with 12 (and later 13) bail conditions. He was subsequently charged with four counts of breaching his bail conditions under s. 145(3), and he was convicted on one count at trial.[65]

In *Zora*, the Court determined the requisite mental element to be found guilty of an offence contrary s. 145(3).[66] The SCC held that in order to achieve a conviction under s. 145(3), the Crown must prove beyond a reasonable doubt that: (i) the accused either knowingly breached, or were willfully blind to their bail conditions, and (ii) the accused knowingly failed to act in accordance with their conditions, or were willfully blind and failed to act in accordance with them, or (iii) they recklessly failed to act in accordance with their conditions. Proof of subjective *mens rea* is required for a conviction under s. 145(3), and Justice Martin wrote "[t]he sky will not fall if the Crown has to prove a mental element."[67]

Zora is also notable for the Court's commentary in *obiter* on the imposition of bail conditions, especially in light of shifting societal values. They expressed concern over unreasonable, disproportionate, and intrusive bail conditions upon vulnerable, over-represented, and marginalized members of Canadian society. While the Court reinforced

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61 *Ibid.*

62 *Ibid* at para 95.

63 *Esseghaier* ONCA, *supra* note 60.

64 *R v Zora*, 2020 SCC 14 [*Zora*].

65 *Ibid* at paras 1–11.

66 *Ibid.*

67 *Ibid* at para 122.

the general principles of bail, to animate these principles the Court provided a list of five inter-related questions that should be analyzed in determining whether an accused's bail conditions are appropriate.[68] Finally, the Court provided a strongly worded reminder to both counsel and judges on the individualized nature of bail conditions and warned against the imposition of unnecessary boilerplate bail conditions.[69] This unanimous decision flows cogently from the seminal bail decision in *Antic* and reflects the Supreme Court's concern with placing the accused on numerous and unsupported conditions while on bail.[70]

V. COMMENTS: SCC

Change was one of the common themes in several decisions from February 2020 to February 2021. Many of the SCC's decisions were rendered orally or with little written reasons provided. However, where the SCC did provide written reasons, they can be seen to evoke change. Several of the SCC's lengthier written decisions including *Zora* and *Friesen* emulate the Court's awareness of systemic issues and their real-time

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68 *Ibid* at para 89. Justice Martin noted that in order to ensure principles of restraint, the following considerations are important: (1) If released without conditions, would the accused pose any specific statutory risks that justify imposing any bail conditions? If the accused is released without conditions, are they at risk of failing to attend their court date, harming public safety and protection, or reducing confidence in the administration of justice? (2) Is this condition necessary? If this condition was not imposed, would that create a risk of the accused absconding, harm to public protection and safety, or loss of confidence in the administration of justice which would prevent the court from releasing the accused on an undertaking without conditions? (3) Is this condition reasonable? Is the condition clear and proportional to the risk posed by the accused? Can the accused be expected to meet this condition safely and reasonably? Based on what is known of the accused, is it likely that their living situation, addiction, disability, or illness will make them unable to fulfill this condition? (4) Is this condition sufficiently linked to the grounds of detention under s. 515(10)(c)? Is it narrowly focussed on addressing that specific risk posed by the accused's release? (5) What is the cumulative effect of all the conditions? Taken together, are they the fewest and least onerous conditions required in the circumstances?

69 *Zora*, *supra* note 64 at para 100.

70 *R v Antic*, 2018 SCC 27. For a full discussion of the dangers of placing an accused on too many unsupported conditions on release, see generally Nicole M. Myers & David Ireland, "Unpacking Manitoba Bail Practices: Systemic Discrimination, Conditions of Release and the Potential to Reduce the Remand Population" (2021) 69:1 Crim LQ 26.

response to these issues. Even where the SCC only provides brief written decisions, such as in *Slatter* and *Riley*, what is provided is potentially very important systemically. Moving forward into 2021 and beyond, it will prove interesting to see the SCC's decisions post-COVID-19, whether there is a change in their delivery, and whether the Court's trend towards accepting and addressing social justice issues continues.

At the time of writing the appeals dealing with the so called Gomeshi amendments and other aspects of the new legislative regime concerning sexual assault provisions brought about by Bill C-51,[71] are being argued in the Supreme Court of Canada.[72] Criminal lawyers across Canada will wait with bated breath to see the direction the Supreme Court of Canada will take with these amendments, particularly those concerning the role of complainants in the criminal trial process and the forced disclosure of communications in advance of the defence case. Given the previous splits among the nine Justices of the Supreme Court on these highly emotive issues,[73] unanimity on the propriety of this new era of sexual assault litigation may be elusive. Given the groundwork of socially conscious judgments laid in *Zora* and *Friesen*, the Supreme Court may well weigh in on the current zeitgeist and the changing norms encapsulated by the Me Too movement.

VI. STATISTICS: MBCA

From February 2020 through February 2021, the MBCA heard 60 criminal law appeals. The appeals covered a vast array of topics, with numerous cases dealing with multiple issues. For the purpose of this article, where a case overlapped with multiple categories, we have made a subjective decision on which issue was the most important and categorized accordingly.

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71 Canada, Department of Justice, *Bill C-51, An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act* (Ottawa: DOJ, last modified 31 October 2017), online: <www.justice.gc.ca/eng/csj-sjc/pl/cuol-mgnl/c51.html> [perma.cc/P2WN-8N95].

72 *Her Majesty the Queen v JJ* (British Columbia) and *AS v Her Majesty the Queen et al* (Ontario) are being argued at the Supreme Court of Canada. See "Scheduled Hearings" (last modified 4 October 2021), online: *Supreme Court of Canada* <www.scc-csc.ca/case-dossier/info/hear-aud-eng.aspx> [perma.cc/DNG-G868].

73 See e.g. the dissent position of Justice Brown in *R v Goldfinch*, 2019 SCC 38 at paras 149–205, discussing the interpretation of s. 276 of the *Criminal Code*.

A. Appellant Versus Respondent Rates

As is typical, defence appeals vastly outnumbered Crown appeals. The defence appeared as Appellant in 93% (n=56/60) of appeals, whilst the Crown appeared as the Appellant in only 7% (n=4/60) of appeals.

B. Overall Success Rates

Defence counsel was successful in only 22% (n=13/60) of appeals before the MBCA, meanwhile, the Crown was successful in 78% (n=47/60) of appeals before the MBCA. Extrapolation and interpretation of these results is a fraught exercise. Defence counsel proceed to appeal on client instructions while the Crown is afforded the luxury of discretion and a uniform appeal mechanism. With that said however, it cannot be denied that a success rate of only 22% is worrying reading for the local defence bar. This worry is perhaps exacerbated by some of the decisions highlighted below concerning the appeal of witness credibility and reliability cases. The Court is creating a consistent line of authority that holds fast on limiting the circumstances in which an appellate court may legitimately interfere with findings of credibility and reliability of witnesses. This could well further limit defence success at appeal as this jurisprudence crystalizes in the coming years.

C. Appellate Categories

Sentencing was the most commonly explored category at the MBCA from February 2020 to February 2021, accounting for 50% (n=30/60) of appeals. Evidence was another common category which accounted for 32% (n=19/60) of appeals, followed by 12% (n=7/60) of appeals considering Trial Procedure. Furthermore, *Charter* and Miscellaneous appeals accounted for 5% (n=3/60) and 2% (n=1/60), respectively.

VII. CASE ANALYSIS: MBCA

A. *Charter*

Of the 60 criminal law appeals heard by the MBCA from February 2020 to February 2021, only three were *Charter* appeals. The Court ruled on the protections provided by s. 7 of the *Charter* in *R v Thomas et al*, in which the Appellant sought the exclusion of incriminatory comments

made to undercover officers.[74] In their analysis, the MBCA held that the decision to exclude incriminatory comments is not a piecemeal analysis, but a finding of a s. 7 breach does not warrant exclusion of all incriminatory comments where there are multiple "separate operations."[75] In *R v Ong*, the appeal of a trial judge's dismissal of a *Charter* application was unsuccessful.[76] Looking ahead, one *Charter* appeal to follow as it makes it way before the MBCA is *R v Bernier*, in which the Appellant was successful in having leave to appeal granted.[77] That appeal dealt with the constitutionality of s. 229(2) of the *Highway Traffic Act* and whether it violates s. 11(d) of the *Charter*. S. 229 allows an owner of a motor vehicle to be charged with However, the appeal was dismissed from the bench in 2021 by a unanimous court.[78] Justice Steel, on behalf of a five-panel court, declined to reconsider the previous decision of the Manitoba Court of Appeal in *R v. Gray* 1998 CanLII 1374 (MBCA) which found s. 229 of the *Highway Traffic Act* did not violate the presumption of innocence. Bernier had been charged as owner for two photo radar tickets. The court specifically rejected the argument that this legislation infringed the presumption of innocence by creating an assumption that the owner is, in fact, the driver of the vehicle at the time of the infraction. The Court in *Bernier* found that, in fact, only two elements need to be proven under s.229: that the accused owned the vehicle and that the vehicle was involved in the violation. There is no presumption that the accused is the driver and thus there is no *Charter* breach.[79]

B. Evidence

Almost one-third of all cases before the MBCA concerned evidentiary issues (19 out of 60 criminal law appeals heard from February 2020 through February 2021). Determinations of credibility and reliability were the focus of several appeals. In *R v Lewin*, the MBCA reiterated that the burden of proof is not borne by the accused, and even where there are credibility issues, the third step of the *W(D)* test should not be applied in a manner where the lack of credibility of an accused equates to proof of

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74 *R v Thomas et al.*, 2020 MBCA 29.

75 *Ibid* at para 6.

76 *R v Ong*, 2020 MBCA 14.

77 *R v Bernier*, 2020 MBCA 74.

78 See *R v Bernier*, 2021 MBCA 21, reasons released after the bench decision.

79 *Ibid* at para 11.

guilt beyond a reasonable doubt.[80] The test in *W(D)* was also at issue in *R v DT*, an appeal wherein the MBCA held that evidence provided by a nurse about a sexual assault does not require formal expert qualification.[81]

Tangentially related to credibility, the application of the rule in *Browne & Dunn* by trial judges was a question before the MBCA in *R v Dowd*.[82] In *Dowd*, the MBCA allowed the appeal and found that an unfair trial arose because defence counsel failed to put their theory to Crown witnesses, and the trial judge subsequently drew negative inferences from the accused's testimony as a result.[83]

The Court was also asked to decide upon the weight to be afforded to post-offence conduct in *R v Kionke*.[84] In their decision, the Court endorsed the 2019 SCC decision of *R v Calnen*, and further held that "what matters is that the finder-of-fact engages in this analysis and not jump to conclusions based on an accused's behaviour following an incident."[85]

Garofoli applications and the grounds upon which search warrants are issued were the focus in *R v Kupchik* and *R v Overby*.[86] In line with much of the SCC's recent jurisprudence, both appeals were dismissed by the MBCA on the basis that there were reasonable grounds for the issuing justice to believe that an offence was committed and evidence would be found at a specified time.[87] In *Overby*, a particularly gruesome murder case, the test was iterated as: were there reasonable inferences which could be drawn from the information within the ITO[88] which would allow the judge to draw the inference that a victim was murdered, or could the search of an accused's home or vehicle provide evidence of a crime?[89]

The MBCA also heard several appeals in which the accused were unsatisfied with the verdict rendered at the court of first instance and appealed on a number of grounds. In *R v Abbasi*, the MBCA dismissed the appeal on several grounds and held that the burden of showing

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80 *R v Lewin*, 2020 MBCA 13 at para 22.

81 *R v DT*, 2020 MBCA 88 at paras 2, 11.

82 *R v Dowd*, 2020 MBCA 23.

83 *Ibid* at paras 39–40.

84 *R v Kionke*, 2020 MBCA 32.

85 *Ibid* at para 45.

86 *R v Kupchik*, 2020 MBCA 26 [*Kupchik*]; *R v Overby*, 2020 MBCA 121 [*Overby*].

87 *Kupchik*, *supra* note 86 at paras 1–7.

88 Information to Obtain.

89 *Overby*, *supra* note 86 at para 18.

uneven scrutiny of evidence is heavy and the admissibility of rebuttal evidence is left to the discretion of the presiding judge.[90] On several occasions, the MBCA dismissed appeals because the verdicts were reasonable, there was no merit to the argument, and/or deference is owed to the trier of fact at the court of first instance.[91] As stated above, the Manitoba Court of Appeal has, in 2020, developed a clear body of authority that is reluctance to interfere in the discretionary decisions of trial judges. In *R v Peters*, for example, the MBCA made it clear that appellate courts do not embark on fresh analyses of fact. In effect, the Court held that alternative interpretations of fact are not grounds on which an appeal will succeed.[92] Similarly, the MBCA dismissed several evidentiary appeals on the grounds that no appellate intervention was required.[93]

With that said, one evidentiary appeal saw success before the MBCA. In *R v SRF*, the MBCA found that there was a material misapprehension of evidence by the trial judge surrounding the Appellant's employment and his ability to commit the offence due to his employment. Consequently, the Court found that this constituted a miscarriage of justice, and the appeal was granted.[94]

R v Ramos[95] marked one of very few decisions from the MBCA this year which attracted a dissenting opinion. Justice Mainella, for the majority, dismissed the defence appeal on several issues centered around the trial judge's assessment of credibility.[96] Justice Steel dissented, finding the trial judge erred in his application of the principles of *W(D)* to the credibility analysis.[97] The issue therefore made its way to the Supreme Court of Canada where, in a 23-word decision, the Court dismissed the defence appeal in line with the lengthy reasons of Justice Mainella.[98] *Ramos* may be considered an exclamation point on the line of authority

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90 *R v Abbasi*, 2020 MBCA 119 at para 20.

91 See *R v Castel*, 2020 MBCA 41; *R v Singh et al.*, 2020 MBCA 61; *R v Courchene*, 2020 MBCA 68; *R v Contois*, 2020 MBCA 89; *R v McDonald*, 2020 MBCA 92; *R v Herntier*, 2020 MBCA 95; *R v Simon*, 2020 MBCA 117; *R v Buckels*, 2020 MBCA 124.

92 *R v Peters*, 2020 MBCA 33 at para 7. See also *R v Miles*, 2020 MBCA 45.

93 *R v Bonni*, 2020 MBCA 64.

94 *R v SRF*, 2020 MBCA 21.

95 *R v Ramos*, 2020 MBCA 111.

96 *Ibid* at para 1.

97 *Ibid* at para 144.

98 *R v Ramos*, 2021 SCC 15.

developed by the Manitoba Court of Appeal declining to revisit the credibility assessments of trial judges.

C. Sentencing

Sentencing was the most commonly considered category in the MBCA from February 2020 through February 2021, accounting for 30 of the 60 criminal law appeals heard. One of the most important takeaways from the MBCA's decisions this year is the collateral consequences of guilty pleas in the immigration context, as emphasized in *R v Cerna*.[99] In this case, the Appellant plead guilty and was facing deportation pursuant to the *Immigration Refugee Protection Act* ("*IRPA*") and was not informed of these collateral consequences by his counsel at the time of sentencing.[100] On appeal, the accused successfully argued that there was a miscarriage of justice and brought forth a motion to adduce fresh evidence in support of his application to withdraw his guilty pleas.[101] In effect, the *Cerna* case instructs defence counsel to make inquiries and warn clients of immigration consequences and the significant prejudice which may inadvertently arise if they fail to do so. Immigration consequences were also at issue in *R v Dhaliwal*, wherein the MBCA made it clear that judges have a positive duty to raise collateral immigration consequences where counsel fail to do so.[102] Furthermore, in *R v Richards*, the MBCA granted the appeal and reduced the Appellant's sentence from six months to six months less a day so that he was not subject to a removal order under *IRPA*.[103] The MBCA has now made it abundantly clear that criminal lawyers and sentencing judges need to live to immigration consequences arising by operation of the *Criminal Code* and IRPA.

The weight given to *Gladue* factors during sentencing was another commonly explored topic by the MBCA. In *R v Dumas*, it was argued that the accused's *Gladue* factors were not given sufficient weight in the sentencing judge's decision to impose an indeterminate sentence for sexual assault and sexual assault with a weapon. However, this argument was rejected in light of the facts and risk that the Appellant posed.[104] A

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99 *R v Cerna*, 2020 MBCA 18.

100 *Ibid* at paras 1–15.

101 *Ibid* at para 50.

102 *R v Dhaliwal*, 2020 MBCA 65.

103 *R v Richards*, 2020 MBCA 120.

104 *R v Dumas*, 2020 MBCA 28.

similar argument was unsuccessfully advanced with regard to the weight given to the accused's *Gladue* factors in *R v Dram*, *R v Amyotte*, *R v Sinclair*, *R v McKenzie*, and *R v Vaneindhoven*.[105]

Analogous to *Dumas*, in *R v JCW*, the accused advanced an argument that improper weight was given to his *Gladue* factors and that, in totality, his nine-year custodial sentence for sexually assaulting his daughter was unfit.[106] These arguments were rejected by the MBCA in light of the SCC's then-anticipated decision in *Friesen.* While the MBCA held that the accused's sentence was harsh, it was not demonstrably unfit having regard to the risk of public safety and prospects of rehabilitation.[107]

The MBCA's positive treatment of *Friesen* in *JCW* was further echoed in *R v Galatas*, *R v Abbasi*, and *R v JGHW*.[108] In *JGHW*, the accused, a youth, was involved in several serious sexual offences against his half-brothers.[109] At sentencing, the judge sentenced him to a two-year probationary period, something which the MBCA determined did not take into account the meaningful consequences of the accused's actions.[110] As a result, they varied the sentence to a one-year custodial order in addition to an order of two years of supervised probation, but then stayed the effects of the orders recognizing that the youth was now an adult and would serve his sentence in an adult correctional facility.[111] The Court held that since the accused complied with the terms of his probation without incident for three years, it was not in the interests of justice for the accused to serve custodial time, and they stayed the custodial sentence.[112]

Sentencing appeals were successful in several cases. In *R v Peters*, the MBCA considered several issues, the most material of which was the concurrent sentence imposed by the trial judge for one count of breaking and entering and one count of wounding an animal.[113] The trial judge

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105 *R v Dram*, 2020 MBCA 93; *R v Amyotte*, 2020 MBCA 116; *R v Sinclair*, 2021 MBCA 6; *R v McKenzie*, 2021 MBCA 8; *R v Vaneindhoven*, 2020 MBCA 123.

106 *R v JCW*, 2020 MBCA 40 at paras 1–5.

107 *Ibid* at paras 13, 22.

108 *R v Galatas*, 2020 MBCA 108; *R v Abbasi*, 2020 MBCA 119; *R v JGHW*, 2020 MBCA 86.

109 *R v JGHW*, 2020 MBCA 86 at para 1.

110 *Ibid* at para 21.

111 *Ibid* at para 23.

112 *Ibid* at para 25.

113 *R v Peters*, 2020 MBCA 17 at para 1.

sentenced the accused to a two-year concurrent sentence, despite this sentence being well above what the Crown suggested. As a result, Justice Burnett, writing for the majority, found this sentence to be demonstrably unfit and adjusted it to a 90-day concurrent sentence.[114] Similarly, in *R v Neepin*, the accused was successful in her appeal to have her sentence of ten years imprisonment for manslaughter varied to seven years on the grounds that it was demonstrably unfit.[115] In arriving at this decision, the MBCA found that the trial judge erred materially in principle in his consideration of the provocative circumstances and *Gladue* factors, and on these grounds, the appeal was allowed.[116]

The MBCA's decision in *R v KNDW* addressed the intersection of intimate partner violence, the victimization of vulnerable persons, and sentencing. In *KNDW*, the MBCA varied the accused's sentence from two years less a day to five years due to the shocking nature of the sexual assault, witnessed by the complainant's children.[117] Taking into account the SCC's decision in *Friesen*, the MBCA found that although the complainant's children were not direct victims of the sexual assault, they were secondary victims, and it "deeply affected them, which in turn harmed their relationship with her [their mother]."[118] As a result, the Court determined that the sentencing judge had erred in principle and varied the accused's sentence, having regard for *Friesen*, the accused's moral blameworthiness, his *Gladue* factors, and his rehabilitative efforts.[119]

Touching on the weight given to *Gladue* factors as well, the primary issues on appeal in *R v JAW* was whether proper weight was given to the Appellant's *Gladue* factors and whether the Appellant was sentenced more harshly by the trial judge because the complainant was an Indigenous female.[120] Ultimately, the MBCA held that 39 months was not a demonstrably unfit sentence for sexual assault and proper weight was given to *Gladue*.[121] Of great import, however, was the Court's finding that the trial judge did not sentence the Appellant more harshly because the

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114 *Ibid* at paras 14–15.
115 *R v Neepin*, 2020 MBCA 55 at para 80.
116 *Ibid* at paras 64, 80.
117 *R v KNDW*, 2020 MBCA 52 at paras 3–8.
118 *Ibid* at para 38.
119 *Ibid* at paras 42–44.
120 *R v JAW*, 2020 MBCA 62.
121 *Ibid* at paras 19–21.

complainant was Indigenous.[122] This final point is worth noting given that this area of sentencing law is dynamic, with potential implications under ss. 718.04 and 718.201 of the *Code*, which take into account the increased vulnerability of Aboriginal female victims.[123]

Sentencing ranges and maximums were also a topic of consideration for the MBCA this year. In *R v Petrowski*, the Court was asked by the Crown to consider imposing a higher sentencing range for fentanyl trafficking.[124] Despite this request, the MBCA skirted this issue and left it for the Court to decide upon at a later point in time, finding that the Appellant's sentence was not demonstrably unfit.[125] Unlike *Petrowski*, the Court in *R v Kravchenko* provided soft guidance on the sentencing range for aggravated assault with a weapon, suggesting that the range is typically four to eight years.[126] The Court further provided three considerations in sentencing an offender for aggravated assault – namely, (1) the nature of violence used and the offender's state of mind; (2) the harm, wounds, maiming, and disfigurements to the victim, both short term and long term; and (3) not treating the offence of aggravated assault like attempted murder at sentencing.[127] Tangentially related to sentencing ranges, the MBCA recognized in *R v Williams* that intentional acts to cause death do not always attract a harsher sentence than failing to provide the necessities of life.[128]

With regard to maximum sentences, in *R v CP*, the MBCA recognized that the maximum probationary period for youth is two years, and as a result, granted the appeal and reduced the Appellant's probation to two years.[129] Similarly, in *R v Olenick*, the Court reminds us to take care in the sentencing process when dealing with s. 109 (mandatory) and s. 110 (discretionary) weapons prohibitions in the *Criminal Code*.[130] The Court clarified that the offences of theft under $5000 and assault attract a

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122 *Ibid* at para 21.

123 *Criminal Code*, RSC 1985, c C-46, ss 718.04, 718.201 [*Code*]. Further explications of those issues were undertaken in *R v Wood*, 2021 MBQB 4.

124 *R v Petrowski*, 2020 MBCA 78 at para 17 [*Petrowski*]. See also *Petrowski's* companion case, *R v Slotta*, 2020 MBCA 79.

125 *Petrowski*, *supra* note 124 at paras 61, 73.

126 *R v Kravchenko*, 2020 MBCA 30 at para 63.

127 *Ibid* at paras 53–55.

128 *R v Williams*, 2020 MBCA 72.

129 *R v CP*, 2021 MBCA 9.

130 *R v Olenick*, 2021 MBCA 4.

maximum prohibition order of ten years pursuant to s. 110 of the *Code*, not a lifetime pursuant to s. 109.[131]

The MBCA also ruled on several appeals which contemplated sentencing conditions. In *R v Gladu*, the MBCA found that the wordings of conditions imposed at the time of sentencing must be specific since they affect an individual's liberty and constitute an "improper delegation of judicial authority."[132] On the topic of conditions, but in the context of bail conditions, the MBCA further reminded us in *R v Thompsett* that on sentencing, a breach of a bail condition is not an aggravating factor and should only inform the rehabilitative prospects of an accused.[133]

The effect of *Charter* breaches on sentencing was contemplated by the MBCA in *R v Coutu*.[134] In short, the Court held that it is a material error for a judge to give an accused a "free ride" on weapons prohibitions.[135] Interestingly, the Court also cautioned triers of fact against finding "systematic abuse"[136] of *Charter* rights in the context of race relations with police, on the basis of judicial notice.[137] This decision is fascinating since it raises questions that are topical to the current political climate and appears to be indifferent to the SCC's findings on race relations with authorities and systemic concerns highlighted in *R v Le*.[138]

Unsurprisingly, the Court was also asked to consider the effects of the COVID-19 pandemic on sentencing in *R v SCC*.[139] At the time of sentencing, the accused was sentenced to 14 months imprisonment for

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131 *Ibid* at para 7.

132 *R v Gladu*, 2020 MBCA 109 at paras 1–2.

133 *R v Thompsett*, 2020 MBCA 47 at para 4. The Court found that the sentencing judge did not use the breach to "resentence" the accused but rather used it, as is appropriate, to assess the accused's prospects for rehabilitation.

134 *R v Coutu*, 2020 MBCA 106.

135 *Ibid* at paras 35–36.

136 *Ibid* at para 27.

137 *Ibid* at paras 27–28.

138 *R v Le*, 2019 SCC 34. In further opposition to the MBCA position, see *R v Morris*, 2021 ONCA 680 at para 42. The Court endorses judicial notice of the many historical and social factors contributing towards systemic racism. For a general discussion, see Amar Khoday, "Ending the Erasure?: Writing Race into the Story of Psychological Detentions – Examining *R. v. Le*" (2021) 100 SCLR (2d) 165, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3778960> [perma.cc/M9QP-L2LN].

139 *R v SCC*, 2021 MBCA 1.

distribution of an intimate image and 90 days concurrent for a breach.[140] The MBCA found the sentence to be demonstrably unfit, but, at the time of the hearing, the Respondent was granted early release.[141] As a result, the accused's counsel argued, unsuccessfully albeit, that his sentence ought to be stayed in light of the COVID-19 public health crisis.[142] In rejecting this argument, the MBCA took judicial notice of COVID-19, broadly speaking, but refused to take judicial notice of the accused's specific circumstances flowing from time spent in custody due to COVID-19.[143]

Finally, in *R v Ackman* and *R v Ward*, the Appellants' sentence appeals were rejected on the grounds they were not demonstrably unfit.[144] A similar conclusion was reached in *R v Kirton* where expert forensic psychiatric evidence was utilized to uphold the sentencing judge's decision to sentence the Appellant to an indeterminate sentence.[145] In arriving at this result, the MBCA reminded us that the test for determining the fitness of an indeterminate sentence is whether there is "no reasonable expectation of managing the accused's risk within the community"[146] and this "is more than reasonable in light of the evidence before them [him]."[147]

D. Trial Procedure

While many appeals before the MBCA touched upon trial procedure to some extent, only five appeals fall squarely into this category. Touching upon trial procedure during COVID-19, the Court held in *R v Thomas* that an accused has the right to attend their appeal, but this is not an absolute right to be "physically" present at an appeal and can be facilitated by way of technology.[148]

In *R v Nelson*, the Court considered the appropriateness of refreshing a witness' memory (particularly where they are uncooperative) and

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140 *Ibid* at paras 1–3.

141 *Ibid*.

142 *Ibid* at paras 45–47.

143 *Ibid* at para 45.

144 *R v Ackman*, 2020 MBCA 24; *R v Ward*, 2020 MBCA 38; *R v Amyotte*, 2020 MBCA 116.

145 *R v Kirton*, 2020 MBCA 113.

146 *Ibid* at para 19.

147 *Ibid*.

148 *R v Thomas*, 2020 MBCA 84.

recognized the breadth and flexibility of the *Wilks* criteria to refresh a witness' memory.[149]

Several trial procedure appeals before the MBCA considered the prejudice flowing from comments or instructions provided to juries. In *R v Hebert*, the MBCA dismissed the Appellant's appeal on the grounds that no prejudice was effected as a result of the trial judge's failure to instruct the jury on comments made by the Crown during closing arguments.[150] Similarly, in *R v Roulette*, the prejudice of the trial judge's instructions to a jury was at issue.[151] Mirroring the SCC's endorsement of the ABCA's decision in *R v Shlah*,[152] the MBCA determined that jury instructions are not reviewed on a standard of perfection, but rather a standard of adequacy.[153] In effect, the Court held that what matters is that the instructions in their entirety have the overall effect of the jury being properly and fairly instructed.[154]

With regard to seeking leave to appeal, the importance of the accused moving matters along expeditiously was the underlying theme in *R v Jorowski*.[155] Ultimately, the MBCA held that where matters are dated, the case is not compelling and the accused fails to advance the matter diligently, leave to appeal will be denied.[156] Furthermore, in *R v Fisher*, the Court emphasized that even where the Applicant has continuous intention to appeal despite delays, leave to appeal will not be granted where there are no grounds to argue on appeal.[157] Comparatively, in *R v Thorassie*, the accused was successful in having their leave to appeal granted since they showed continuous intention to appeal, despite delay.[158] Of note, the MBCA in *Thorassie* commented on the barriers which people in Northern Manitoba face in accessing counsel and recognized the limitations of legal practice therein.[159]

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149 *R v Nelson*, 2020 MBCA 53 at paras 11–16.
150 *R v Hebert*, 2020 MBCA 16.
151 *R v Roulette*, 2020 MBCA 125 [*Roulette*].
152 *R v Shlah*, 2019 SCC 56.
153 *Roulette*, *supra* note 151 at para 7.
154 *Ibid.*
155 *R v Jorowski*, 2020 MBCA 43.
156 *Ibid* at paras 16–18.
157 *R v Fisher*, 2020 MBCA 75 at paras 6–7, 10–13.
158 *R v Thorassie*, 2020 MBCA 87.
159 *Ibid* at para 10.

Finally, in *R v Brar*, the MBCA provided clear commentary on the prejudice resulting from hearing a delay motion after trial.[160] The Court strongly condemned hearing delay motions after evidence at trial.[161] The Court further condemned the use of lengthy endorsements by judges in *Brar* and "strongly discouraged"[162] this action since it "offends almost the entirety of the notice to the profession"[163] and eliminates any possibility of public circulation.[164]

E. Miscellaneous

Only one of 60 criminal law appeals heard by the MBCA falls under the category of miscellaneous. In *R v VanEindhoven*, the MBCA offered a review of the test for admission of fresh evidence in support of an allegation of ineffective assistance of counsel.[165] Therein, the Court also provided a brief but comprehensive review of the application of the three-pronged test which must be met to support a claim of ineffective assistance of counsel.[166]

VIII. Comments: MBCA

Tying into the theme of change for this year, the MBCA discussed many different legal and practical issues which address adapting to extraordinary times, as well as the current social and political climate. Much like the SCC, the MBCA recognized the numerous faces of harm and its many effects, beyond just the physical, in cases like *Kravchenko* and *JAW*, and the MBCA reflected these harms in many of their decisions on several sentencing appeals. Similarly, the Court considered the flexibility required to adapt to these extraordinary and unprecedented times in decisions such as *Thomas* and *Thorassie*. The MBCA also recognized the importance of being aware of the collateral immigration consequences of guilty pleas in *Cerna*, *Dhaliwal*, and *Richards*, all of which serve a poignant reminder to counsel that Manitoba is an ever-growing and dynamic

160 *R v Brar*, 2020 MBCA 58 at paras 31–33.
161 *Ibid* at para 36.
162 *Ibid* at para 45.
163 *Ibid*.
164 *Ibid*.
165 *R v Vaneindhoven*, 2020 MBCA 123.
166 *Ibid* at para 10.

province, with people of many different origins who call Manitoba home, and we have a duty to ensure that justice is executed, but not justice which brings about both unjust and unintended consequences.

Perhaps the most important theme this year though concerns the Court of Appeal's reluctance to relitigate the decision of trial judges concerning the credibility or reliability of witnesses. These cases, outlined above under part B Evidence, coalesce to provide the defence bar with a fair warning of the road ahead. The judicial discretion of trial judges, always valued by appellate courts, is arguable stronger than ever under the current jurisprudence.

IX. CONCLUSION

The common law continues to evolve in response to emerging societal problems and progressing social norms. Over the course of the past year, we have seen astounding resiliency, adaptability and flexibility in our society and this flexibility is being reflected in our Courts. The Supreme Court of Canada continues to infuse social commentary in their judgments; cases like *Zora* and *Friesen* capture developing social thinking in Canada. As progressive thinking holds sway, Canada's top court appears emboldened to wade into these waters to both reflect, and perhaps encourage, these emerging social movements. Cases at the national and Provincial level continue to reflect the progressive direction of Me Too, Black Lives Matter and other positive incremental moves towards a fairer and more just society.

Such commentary from our appellate courts is to be celebrated. Positive change that better reflects the values of Canada's multi-cultural society cannot and should not happen outside of the common law. Lawyers and judges must continue to shape our responses to shared problems in society. When we look at the past year, there are encouraging signs that the Manitoba Court of Appeal and the Supreme Court of Canada are keeping pace with society at large by positively addressing some of these important issues in their judgments.

Appendix I: Table of Authorities

Supreme Court of Canada Cases – February 2020 to February 2021

Charter
R v Chouhan, 2020 CarswellOnt 14612, SCJ No. 101.
R v KGK, 2020 SCC 7.
R v Reilly, 2020 SCC 27.
R v Thanabalasingham, 2020 SCC 18.

Defences
R v Ahmad, 2020 SCC 11.
R v Chung, 2020 SCC 8.
R v Li, 2020 SCC 12.

Evidence
R v Cortes Rivera, 2020 SCC 44.
R v Delmas, 2020 SCC 39.
R v Doonanco, 2020 SCC 2.
R v Langan, 2020 SCC 33.
R v Kishayinew, 2020 SCC 34.
R v Mehari, 2020 SCC 40.
R v Slatter, 2020 SCC 36.
R v WM, 2020 SCC 42.

Sentencing
R v Friesen, 2020 SCC 9.

Trial Procedure
R v Esseghaier, 2020 CarswellOnt 14614.
R v Riley, 2020 SCC 31.
R v SH, 2020 SCC 3.

Miscellaneous
R v Zora, 2020 SCC 14.

Decisions from Other Years
R v Le, 2019 SCC 34.
R v Shlah, 2019 SCC 56.

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Charter
R v Bernier, 2020 MBCA 74.
R v Ong, 2020 MBCA 14.
R v Thomas et al., 2020 MBCA 29.

Evidence
R v Bonni, 2020 MBCA 64.
R v Buckels, 2020 MBCA 124.
R v Castel, 2020 MBCA 41.
R v Contois, 2020 MBCA 89.
R v Courchene, 2020 MBCA 68.
R v Dowd, 2020 MBCA 23.
R v DT, 2020 MBCA 88.
R v Herntier, 2020 MBCA 95.
R v Kionke, 2020 MBCA 32.
R v Kupchik, 2020 MBCA 26.
R v Lewin, 2020 MBCA 13.
R v McDonald, 2020 MBCA 92.
R v Miles, 2020 MBCA 117.
R v Overby, 2020 MBCA 121.
R v Peters, 2020 MBCA 33.
R v Ramos, 2020 MBCA 111.
R v Simon, 2020 MBCA 117.
R v Singh et al., 2020 MBCA 61.
R v SRF, 2020 MBCA 21.

Sentencing
R v Abbasi, 2020 MBCA 119.
R v Ackman, 2020 MBCA 24.
R v Amyotte, 2020 MBCA 116.
R v Cerna, 2020 MBCA 18.

R v Coutu, 2020 MBCA 106.
R v CP, 2021 MBCA 9.
R v Dhaliwal, 2020 MBCA 65.
R v Dram, 2020 MBCA 93.
R v Dumas, 2020 MBCA 28.
R v Galatas, 2020 MBCA 108.
R v Gladu, 2020 MBCA 47.
R v JAW, 2020 MBCA 62.
R v JCW, 2020 MBCA 40.
R v JGHW, 2020 MBCA 86.
R v Kirton, 2020 MBCA 113.
R v KNDW, 2020 MBCA 52.
R v Kravchenko, 2020 MBCA 30.
R v McKenzie, 2021 MBCA 8.
R v Neepin, 2020 MBCA 55.
R v Olenick, 2021 MBCA 4.
R v Peters, 2020 MBCA 17.
R v Petrowski, 2020 MBCA 78.
R v Richards, 2020 MBCA 120.
R v SCC, 2021 MBCA 1.
R v Sinclair, 2021 MBCA 6.
R v Slotta, 2020 MBCA 79.
R v Thomas, 2020 MBCA 84.
R v Thompsett, 2020 MBCA 47.
R v Ward, 2020 MBCA 38.
R v Williams, 2020 MBCA 72.

Trial Procedure

R v Brar, 2020 MBCA 58.
R v Fisher, 2020 MBCA 75.
R v Hebert, 2020 MBCA 16.
R v Jorowski, 2020 MBCA 43.
R v Nelson, 2020 MBCA 53.
R v Roulette, 2020 MBCA 125.
R v Thorassie, 2020 MBCA 87.

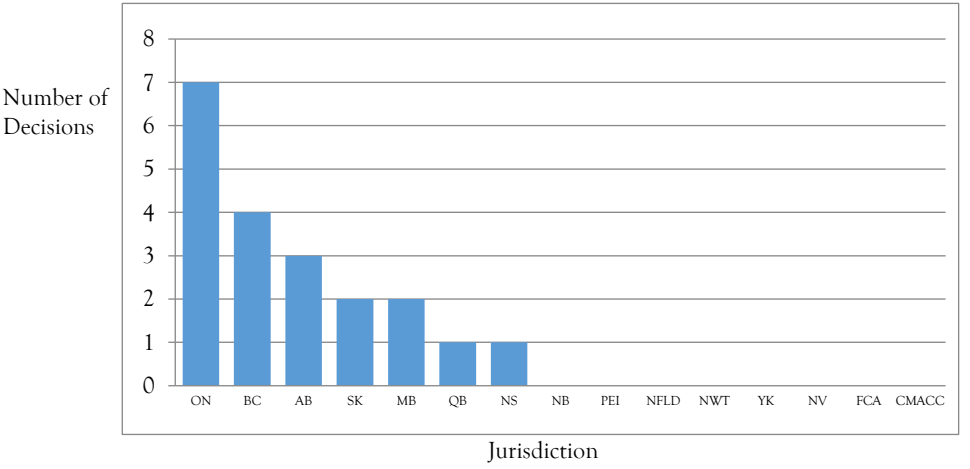
Miscellaneous
R v VanEindhoven, 2020 MBCA 123.

Decisions From Other Manitoba Courts
R v Wood, 2021 MBQB 4.

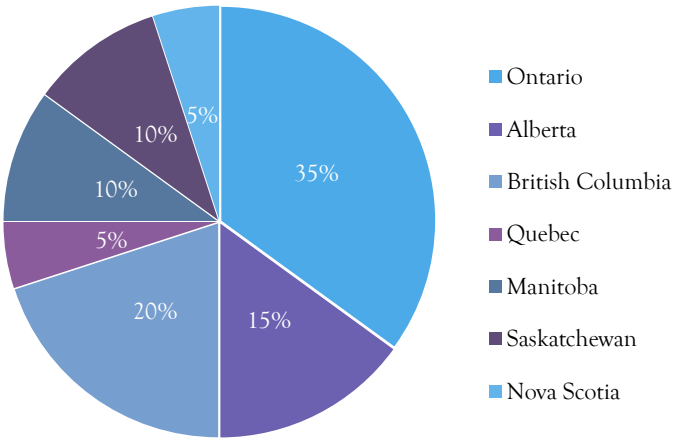
Appendix II: Statistical Tables and Graphical Representations

STATISTICAL INFOGRAPHICS OF SCC DECISIONS: FEBRUARY 2020 TO FEBRUARY 2021

Supreme Court Decisions by Jurisdiction of Origin
February 2020 to February 2021

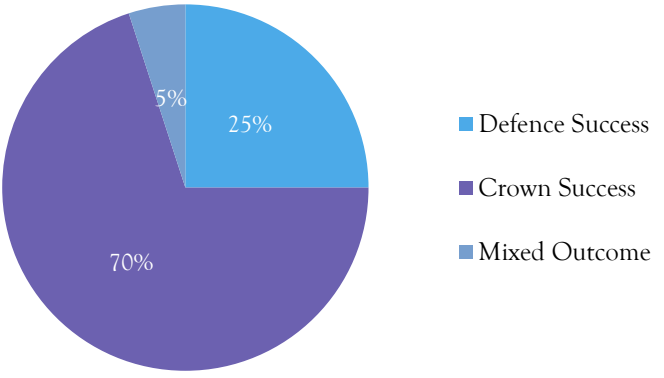


Proportion of Supreme Court Decisions by Jurisdiction of Origin
February 2020 to February 2021

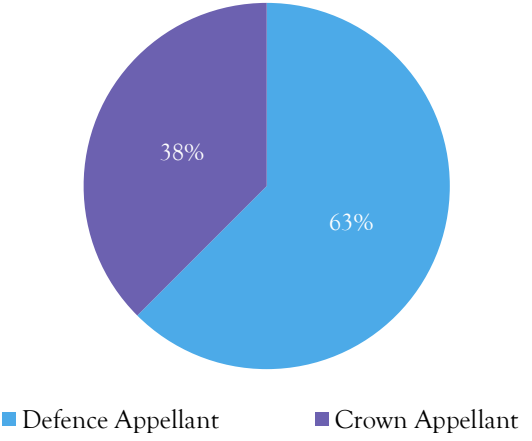


STATISTICAL INFOGRAPHICS OF SCC DECISIONS: FEBRUARY 2020 TO FEBRUARY 2021

Outcome of Supreme Court Decisions
February 2020 to February 2021

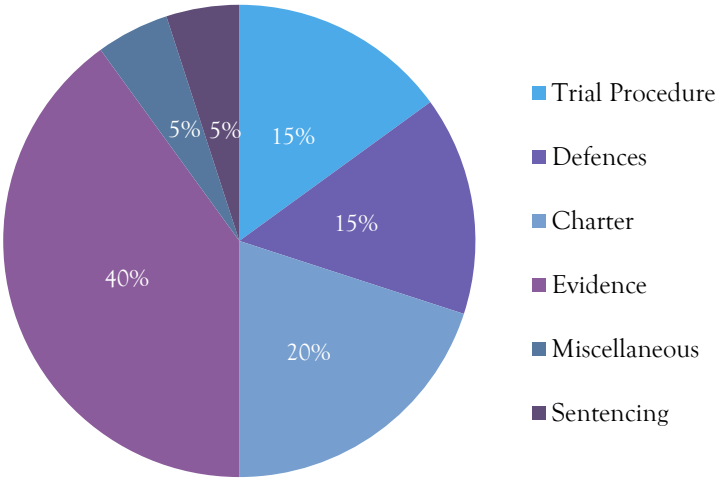


Appearances as Appellants in Supreme Court Decisions
February 2020 to February 2021

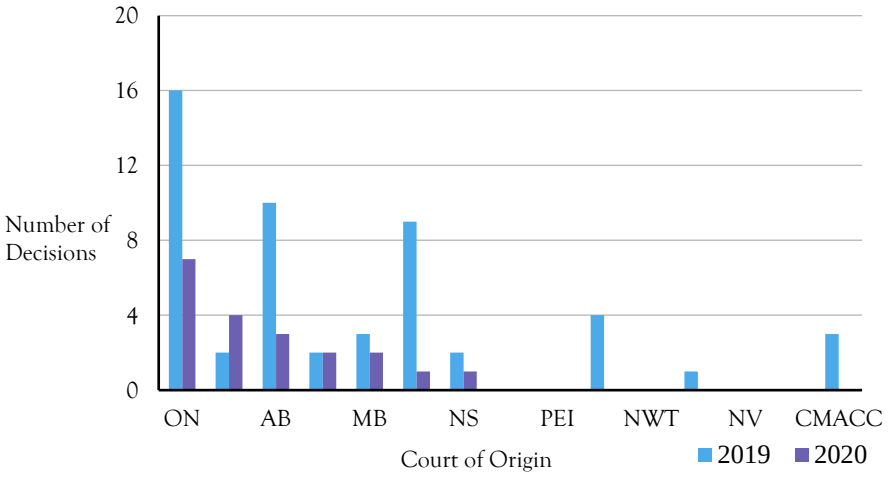


STATISTICAL INFOGRAPHICS OF SCC DECISIONS:FEBRUARY 2020 TO FEBRUARY 2021

Grounds of Appeal of Supreme Court Decisions
February 2020 to February 2021

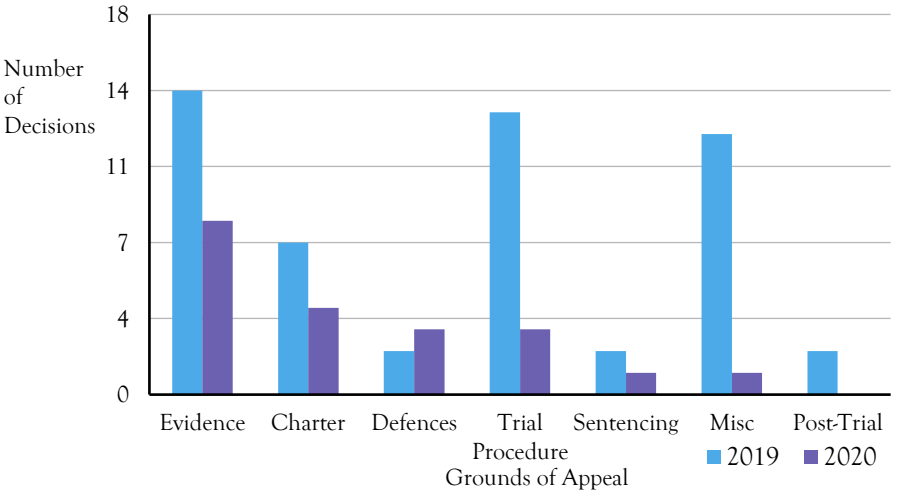


Comparing the Court of Origin of SCC Decisions from 2019 to 2020

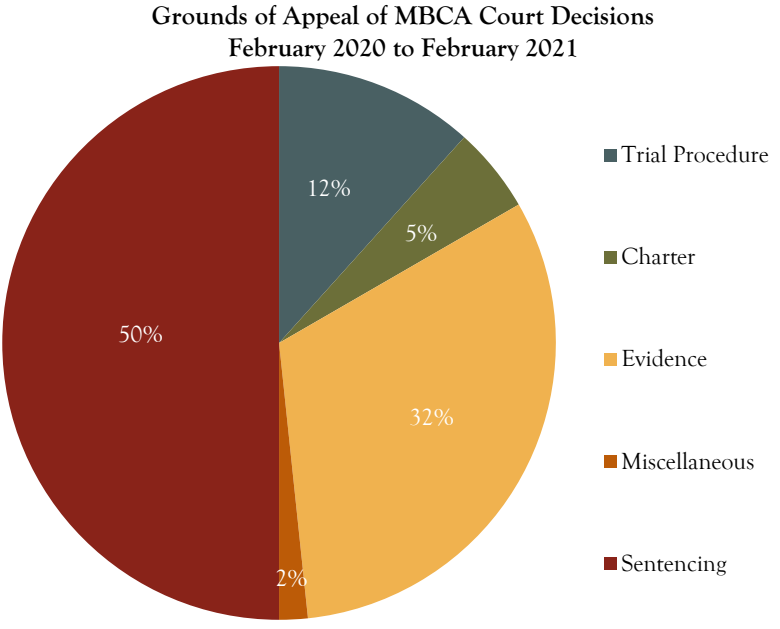


STATISTICAL INFOGRAPHICS OF SCC DECISIONS: FEBRUARY 2020 TO FEBRUARY 2021

Comparing the Grounds of Appeal of SCC Decisions from 2019 to 2020

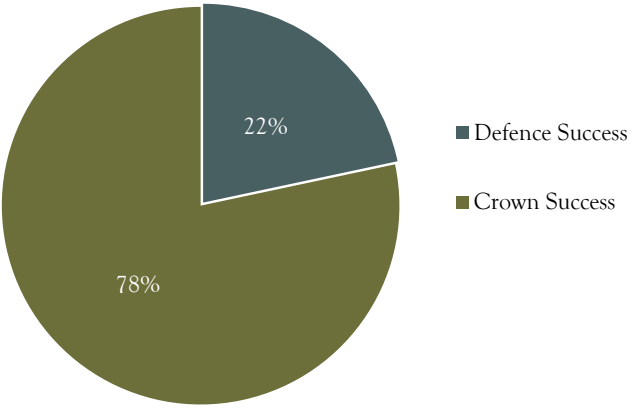


STATISTICAL INFOGRAPHICS OF MBCA DECISIONS: FEBRUARY 2020 TO FEBRUARY 2021

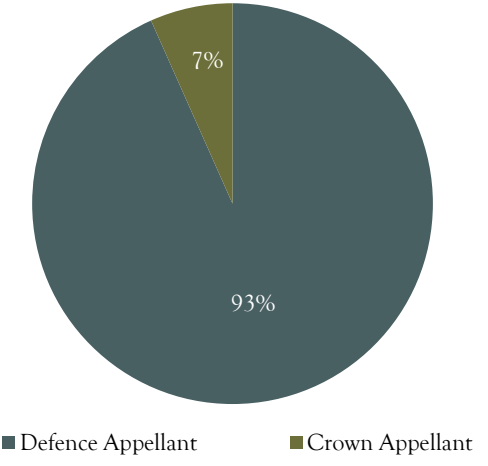


STATISTICAL INFOGRAPHICS OF MBCA DECISIONS: FEBRUARY 2020 TO FEBRUARY 2021

Outcome of MBCA Decisions
February 2020 to February 2021



Appearances as Appellants in MBCA Decisions
February 2020 to February 2021



STATISTICAL INFOGRAPHICS OF MBCA DECISIONS: FEBRUARY 2020 TO FEBRUARY 2021